

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE GUY MITCHELL & BETTY J.
MITCHELL FAMILY TRUST,

Plaintiff,

v.

ARTIST RIGHTS ENFORCEMENT
CORPORATION, a New York
Corporation,

Defendant.

NO: 11-CV-0024-TOR

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION

BEFORE THE COURT is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 165). This matter was submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

Defendant Artist Rights Enforcement Corporation ("AREC") moves the court under Fed. R. Civ. P. 12(h)(3) for an order determining that the Court lacks subject matter jurisdiction, arguing that Plaintiff the Guy Mitchell & Betty J.

1 Mitchell Family Trust (“the Trust”) has failed to meet the amount-in-controversy
2 requirement of the diversity statute. ECF No. 165 at 2.

3 BACKGROUND

4 Guy Mitchell was a successful musician in the 1950s who released at least
5 nine records that have sold more than one million copies each. ECF No. 61 at 2.
6 Before he died in 1999, Mr. Mitchell assigned to the Trust the rights to collect
7 music royalties under various recording contracts with Sony. *Id.* Mrs. Mitchell
8 was a co-trustee with her son Joseph Stanzak (“Stanzak”) until her death in
9 November 2010, at which point Stanzak became sole trustee. *Id.* For decades,
10 Sony Music, Inc. and/or its predecessor-in-interest (“Sony”) has paid regular semi-
11 annual royalties to Guy Mitchell or to the Trust. *Id.* The Trust also performed
12 periodic audits revealing errors and underreporting of royalties from Sony, which
13 would result in an additional lump sum payment to the Trust.

14 On June 13, 2005, Mrs. Mitchell, on behalf of the Trust, and Chuck Rubin
15 (“Rubin”) on behalf of AREC, signed an agreement (“Agreement”) for AREC to
16 represent the Trust in investigating and recovering royalties due to the Trust from
17 Sony. ECF No. 61-1. The Agreement provided in relevant part that

18 [i]n return for your services rendered hereunder, you shall be initially
19 entitled to an on-going twenty-five (25%) percent of all sums and assets
20 which are received from Sony BMG Music Entertainment (successor-in-
interest to Columbia Records, CBS Records and Sony Music) beginning
with any special payments made after June 30, 2005 and specifically with

1 the period ending December 31, 2005. However, in return for your services
2 rendered hereunder and as a proximate result of your activities pursuant to
3 this agreement, if you are successful through either negotiation or litigation
4 in generating income that is in excess of the amount THE FAMILY TRUST
5 would have received but for your involvement, you shall then be entitled to
6 an on-going fifty (50%) percent of such sums and assets. I further agree that
7 all out-of-pocket expenses (including fees to additional local counsel)
8 incurred by you in connection with the handling of THE FAMILY TRUST's
9 claim(s) shall be reimbursed and deducted "off the top" from the amounts
10 recovered before the division of our respective shares.

11 ECF No. 7-1. The Trust also authorized AREC to collect and receive all royalties
12 on behalf of the Trust. ECF No. 74-5. In October 2006, AREC arranged for
13 counsel to represent the Trust in a lawsuit against Sony, and AREC coordinated the
14 resulting litigation and participated in the settlement negotiations. ECF No. 61 at
15 4. In March of 2009, the lawsuit against Sony was settled for a one-time payment,
16 and the royalties accrued thereafter would continue to be governed by pre-existing
17 recording contracts. ECF No. 66 at 5. According to the Trust, in August 2009,
18 AREC improperly retained 50 percent of the Trust's royalty payment in the
19 amount of \$3,010.34. *See* ECF No. 61-1.

20 The Trust sued AREC in diversity, alleging breach of contract, breach of
fiduciary duty, common law fraud, negligent misrepresentation and conversion.
ECF No. 7. Plaintiff is a trust currently existing under the laws of the State of
Washington. Defendant is a New York corporation with its principal place of
business in Westchester County, New York. Plaintiff's Amended Complaint

alleges that Plaintiff will be deprived of more than \$75,000 “as a result of Defendant’s unlawful retention of royalties owed to Plaintiff.” ECF No. 7 at 3.

Shortly after this action commenced, Defendant filed a motion to dismiss, alleging among other things that Plaintiff could not satisfy the amount in controversy requirement and thus the court did not have subject matter jurisdiction. ECF No. 11 at 14. Judge Suko denied this motion. ECF No. 26. More than two years later, Defendant moved for leave to file a motion to dismiss for lack of subject matter jurisdiction (ECF No. 164). The motion to dismiss, currently before the Court, requests reconsideration of Judge Suko's May 19, 2011, order. ECF No. 165 at 2. It argues that Plaintiff lacked a good-faith allegation of amount in controversy when the complaint was filed and that Plaintiff's assumption of future damages was speculative as a matter of law. *Id.*

DISCUSSION

A. Amount in Controversy

United States District Courts have original subject-matter jurisdiction over cases between citizens of different states and in which the amount in controversy exceeds \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). The party invoking a federal court’s diversity jurisdiction has the burden of establishing that § 1332(a)’s diversity of citizenship and amount-in-controversy requirements have been satisfied. *See Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010).

1 The amount in controversy is generally determined from the face of the
2 pleadings. *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1131 (9th Cir.
3 2000). “The sum claimed by the plaintiff controls so long as the claim is made in
4 good faith.” *Id.* (citing *St. Paul Mercury Indem. Co v. Red Cab Co.*, 303 U.S. 283,
5 288 (1938)). “In actions seeking declaratory or injunctive relief, it is well
6 established that the amount in controversy is measured by the value of the object of
7 the litigation.” *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (citing
8 *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977)). The
9 amount in controversy is determined at the time of suit. *Molina v. Richardson*, 578
10 F.2d 846, 849 (1978). “To justify dismissal, it must appear to a legal certainty that
11 the claim is really for less than the jurisdictional amount.” *Crum*, 231 F.3d at 1131
12 (citations omitted).

13 Here, it does not appear to a legal certainty that the Trust’s claim is really for
14 less than the jurisdictional amount. In addition to the unspecified money damages
15 the Trust claims, the Trust requests “permanent injunctive relief” to prevent
16 Defendant from “retaining any portion of Plaintiff’s royalties.” ECF No. 7 at 18-
17 19. In cases seeking injunctive relief, the amount in controversy is determined by
18 the value of the object of the litigation. *Cohn*, 281 F.3d at 840. The object of the
19 requested injunctive relief as stated in the Trust’s amended complaint is, in part,
20 AREC’s right to retain fees stemming from future royalty payments. *See* ECF No.

1 7 at 19. The Agreement specifies that AREC is entitled to an “on-going” 25 then
2 50 percent of semi-annual royalty payments, ECF No. 7-1; the Agreement does not
3 have a definite duration, *id.*; and the Trust seeks on-going and indefinite injunctive
4 relief, *see* ECF No. 7 at 18-19.

5 The Trust notes that it used \$12,000 in royalty payments per year¹ as an
6 average to calculate the amount in controversy because it was the “base” the
7 parties had agreed to use in the past. *See* ECF No. 183 at 3. However, even if the
8 Court uses as a base the average yearly royalty income from 2006 through 2010²
9 (when AREC’s involvement began through commencement of this suit), the
10 jurisdictional amount would be reached within 20 years: \$7,576.73 (the 2006-2010
11 average) divided in half (50 percent fee claimed by AREC) equals \$3788.36;
12 multiplied by 20 years, equals \$75,767.26. Defendant argues that “the amount of
13 royalties generated in the years preceding the filing of the complaint was far from
14 consistent.” ECF No. 165 at 8. However, even if the yearly royalty payments
15 decrease in value, they could conceivably continue to accrue for many years; thus,

16
17 ¹ This is the amount used in Judge Suko’s order denying Defendant’s first motion
18 to dismiss. ECF No. 26. Defendant disputes the propriety of using this number in
19 several instances. *See* ECF No. 165 at 2, 4, 7 and 8.

20 ² *See* earnings table, ECF No. 183 at 14.

1 the Court cannot find *to a legal certainty* that they will not exceed the
2 jurisdictional amount.

3 AREC argues that the Trust cannot base jurisdiction on events occurring
4 after the complaint is filed. ECF No. 184 at 8. However, here, the jurisdictional
5 amount is calculated based on the value of the contract; i.e., the amount AREC
6 would have a right to take under the contract. The contract—and its resulting
7 potential future benefit or liability—existed at the time the complaint was filed.

8 AREC also contends that “the extrapolation of future royalties based on past
9 sales of Mr. Mitchell’s works constitutes improper speculation as a matter of law.”
10 ECF No. 165 at 8. The Court finds Defendant’s arguments and cited authority
11 unpersuasive. For example, AREC states that “consideration of future payments in
12 computing the amount in controversy” is limited “to awards that may be paid by a
13 single judgment reduced to present value” citing *Aetna Cas. & Sur. Co. v. Flowers*,
14 330 U.S. 464, 467 (1947). ECF No. 165 at 9. *Aetna* succinctly stated the principle
15 that “[i]f this case were one where judgment could be *entered only for the*
16 *installments due at the commencement of the suit.* . . future installments could not
17 be considered in determining whether the jurisdictional amount was involved....”
18 *Id.* (emphasis added). But then the Court held, “this is not that type of case.” *Id.*
19 In *Aetna*, a widow sued for burial expenses and death benefits payable at a rate of
20 not more than \$18 per week. At that time, the diversity minimum amount in

1 controversy was \$3,000. Death benefits were limited to 60% of the average
2 weekly wages of the deceased, could not continue for more than 400 weeks, ceased
3 upon the death or remarriage of the widow, and ceased upon the attainment of the
4 age of eighteen by her children. The Supreme Court then held:

5 Nor does the fact that it cannot be known as a matter of absolute
6 certainty that the amount which may ultimately be paid, if respondent
7 prevails, will exceed \$3,000, mean that the jurisdictional amount is
8 lacking. This Court has rejected such a restrictive interpretation of the
9 statute creating diversity jurisdiction. It has held that a possibility that
10 payments will terminate before the total reaches the jurisdictional
11 minimum is immaterial if the right to all the payments is in issue.
12 Future payments are not in any proper sense contingent, although they
13 may be decreased or cut off altogether by the operation of conditions
14 subsequent. And there is no suggestion that by reason of life
15 expectancy or law of averages the maximum amount recoverable can
16 be expected to fall below the jurisdictional minimum. Moreover, the
17 computation of the maximum amount recoverable is not complicated
18 by the necessity of determining the life expectancy of respondent.

19 *Id.* at 348 (citations omitted).

20 The instant case is more like *Aetna* than not. The Trust seeks prospective
injunctive relief for future royalty payments; thus the judgment it seeks is not just
the payments due at the commencement of the suit, but rather it also includes a
stream of royalty payments indefinitely.

Defendant cites several cases concerning the amount in controversy in
removal proceedings (*see* ECF No. 165 at 9-12; ECF No. 184 at 4-5), but the Court
does not find them persuasive because “somewhat different standards of proof

1 typically are used for actions that enter the federal court system by way of
2 removal....” 14AA Wright & Miller, Fed. Prac. & Proc. Juris. § 3702 (4th ed.
3 2013). The test here is whether Defendant can establish to a “legal certainty” that
4 the claim is really for less than the jurisdictional amount. Defendant has not done
5 so here.

6 **B. Other Matters**

7 Additionally, AREC’s supplemental reply asks the Court to strike the Trust’s
8 “improper surreply submitted in the guise of a tardy ‘opposition.’” ECF No. 184 at
9 3. The Trust’s Opposition to Defendant’s Motion to Dismiss for Lack of Subject
10 Matter Jurisdiction (ECF No. 183) was filed on October 1, 2013—fourteen days
11 after the Court granted Defendant’s Motion for Leave to File Motion to Dismiss.
12 *See* ECF No. 180. This is within the time allotted by Local Rule 7.1(b) for filing a
13 responsive memorandum to a dispositive motion. The Trust’s opposition is timely
14 and was not waived by its earlier opposition to Defendant’s motion for leave to file
15 its motion to dismiss. The Court declines to strike the Trust’s response.

16 Accordingly, **IT IS HEREBY ORDERED:**

17 Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF
18 No. 165) is **DENIED**.

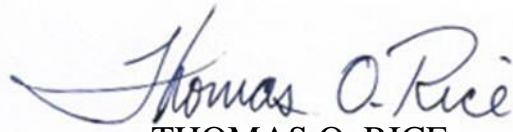
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1 The District Court Executive is hereby directed to enter this Order and
2 provide copies to counsel.

3 **DATED** October 8, 2013.




THOMAS O. RICE
United States District Judge